Before the Federal Communications Commission
Washington, D.C. 20554
Notice of Proposed Rulemaking
FCC 02-42

In the Matter of

APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES	)	CC Docket No. 02-33
UNIVERSAL SERVICE OBLIGATIONS OF BROADBAND PROVIDERS	)	
COMPUTER III FURTHER REMAND PROCEEDINGS: BELL OPERATING COMPANY PROVISION OF ENHANCED SERVICES; 1998 BIENNIAL REGULATORY REVIEW REVIEW OF COMPUTER III AND ONA SAFEGUARDS AND REQUIREMENTS	)	CC Dockets Nos. 95-20, 98-10

Comments of the Minnesota Department of Commerce

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_____/s/_____
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I. Background

One of the primary purposes of the Telecommunications Act of 1996 was to promote telecommunications competition throughout the country. Congress intended to spur competition by requiring and encouraging companies to provide wholesale telecommunications services. Two key ways in which Congress hoped to promote the provision of wholesale services are through requirements which would (i) encourage competitors to "resell" telecommunications services; and (ii) encourage competitors to provide facilities-based competition by requiring incumbent telephone companies to "unbundle" the components of their telecommunications networks and make them available for the use of competitors at a price based on forward-looking costs.

In Minnesota, incumbent local telephone companies have been resistant to opening their networks for the use of their competitors. Minnesota has aggressively enforced the 1996 Act. We are making progress, albeit slow. This is to be expected when trying to transform a government-protected monopoly into a competitive industry. According to the most recent FCC report on competition, competitive local exchange carriers have acquired 11% of the local phone market in Minnesota. We're one of the more successful states in the nation judging from these statistics.

Given the time, money, and sweat that has gone into making the Act work for Minnesota, the MDOC cannot help but read the FCC's recent series of proposed rules with frustrated confusion. Instead of carrying out the will of Congress, the FCC's proposed rules, despite recitations to the contrary, seem to reflect a deliberate policy shift which would undo the six years of work that has gone into the Act, and seriously undermine the Act's effective power going forward. The tentative conclusions in the NPRM erect new regulatory barriers to competition in this industry of evolving technology, ground in the artifice of "definitional interpretation," long before the Bell-era regulatory barriers have been completely torn down as required by the Telecommunications Act of 1996. The MDOC respectfully submits that the wrong questions are being asked, at the wrong time. More disturbingly, the MDOC believes the FCC is coming up with the wrong answers.

II. Statutory Classifications of Wireline Broadband Internet Access Services

A. The Plain Text of the Applicable Statutes, as well as Previous FCC Actions, Require that the Transmission Component of the Broadband Internet Access be Considered a Telecommunications Service.

The FCC's NPRM tentatively concludes that a company providing wireline broadband over its own transmission facilities is an "information service" provider, that the transmission component of this internet access is "telecommunications," not a "telecommunications service." The Commission reaches this tentative conclusion by examining the statutory definitions of these terms, and by examining the regulatory history that led to the definition of information service.

Federal law defines a telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[1] The term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2] The 1996 Act defines the term information service is as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the

[1] 47 U.S.C. § 153.
[2] Id.

> management, control, or operation of a telecommunications system or the management of a telecommunications service.[3]

The MDOC believes that based on regulatory history and current statutes, the provisioning of wireline broadband transmission should be classified as a telecommunications service. Furthermore, policy considerations further encourage the Commission, in the interest of promoting competition, to classify the service as a telecommunications service.

The MDOC acknowledges that Internet Service Providers (ISP's) that do not own their own transmission facilities have already been classified as providing information services. At the time of that classification, the Commission excluded those providers that owned their own transmission facilities, recognizing that the service was of a different nature. The fact that those providers controlled the transmission component of the service apparently gave the Commission enough pause to decide to exclude such providers from its classification.

Other FCC decisions have classified a service as an information service and have retained the separation between the transmission and the information component. For example, voice mail, which the FCC had determined was an enhanced service and later an information service, "uses the existing telephone network."[4] However, the FCC did not reason that because the service used the telephone network, the two were a single offering and thus the transmission component of the network was also an information service, as it proposes to do in the current proceeding. In the current NPRM the Commission initially determines that the information provided, in addition to the transmission service, is a "single, integrated offering to the end-user." The MDOC submits that this formulation does not comport with the way consumers are using these services.

From a consumer's point of view, high speed data service is comprised of two distinct elements, and is not an "integrated service offering" as the FCC tentatively concludes. Business consumers often separate the internet access portion of the service from the transmission. For example, a business with multiple locations across a city or state may set up a Virtual Private Network (VPN), whereby its locations can communicate and share data. The VPN can be separate for business applications other than internet traffic. While businesses may purchase the broadband transmission and internet access from a single provider, the traffic across the broadband transmission may not always be internet traffic.

The MDOC notes that in the Commission's recent Order classifying cable modem service as an information service, the Commission used similar reasoning to exclude certain broadband services from its classification.[5] The Commission indicated in its Order that "offerings of high-speed internet access that are targeted as businesses, including small ones…" were not being considered in that proceeding.[6] The Commission gave, as an example, Comcast Computer Corp.'s Broadband Commuter Service. According to Comcast's website, the service connects "employees working from home" to a corporate LAN.[7] In addition, the Commission specified that it was not considering other Internet-based services offered by cable operators, such as Virtual Private Networks (VPNs).[8] In its specification, the Commission acknowledged that VPN, while using "the shared resources of the Internet," provides a service more similar to a dedicated private line.[9] While these exclusions may not be as significant for cable broadband service, which is primarily a residential service, these distinctions are much more noteworthy for broadband over the telephone network, which is often the primary provider of broadband service for business.

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[3] Id. §153(20).
[4] In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, FCC 99-36, fn 11, Released March 10, 1999.
[5] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, FCC 02-77, Released March 15, 2002.
[6] Id. ¶ 2, fn 5.
[7] http://www.comcastbusiness.com/pdf/Broadband_Commuter_Service.pdf (accessed April 4, 2002).
[8] Internet Over Cable Declaratory Ruling, FCC 02-77, ¶ 31, fn 129.
[9] Id.

Residential consumers are beginning to realize the benefits that result from public policies recognizing that internet access is a layer independent of the transmission network. For example, in Minnesota, Qwest is required to offer customers the ability to choose an unaffiliated ISP, underscoring that there is no technical reason the information service provider and the transmission service provider cannot be viewed as distinct. The presence of multiple, competing ISP's also demonstrates the need to distinguish the telecommunications service and an information service components of broadband access. Consumers are aware that, when they subscribe to DSL service from a telephone company, they can choose among multiple ISPs. When a consumer purchases DSL transmission from the wireline provider but internet access from an independent ISP that does not own its own transmission facilities, the consumer pays both for the internet access and the transmission, but to two different entities. For example, Qwest's website indicates that when a customer chooses an independent ISP, the customer purchases the broadband transmission from Qwest at one fee, then can access a list of ISP's available in the customer's area, for another fee.[10] The two services are separate. When the consumer purchases both the broadband transmission and the internet access service from the wireline provider, the consumer still pays for both the transmission and the internet access; the services are merely marketed together. The fact that the consumer pays for two services to one entity does not make a single offering. Rather, two services are part of a package. Other telecommunications services can be marketed together; for example, voice mail can be packaged with a basic residential phone line; however, the packaging of these together does not change the fact that the basic phone line is regulated differently than voice mail. Cable operators are also entering into arrangements to afford consumers a choice in ISPs. Consumers who have DSL at their home can have access to the internet access with a DSL line, but may also access a workplace location through a VPN. In that situation, the traffic between the home and office does not transit the internet. While the MDOC acknowledges that customers purchase the transmission component along with the internet access component, broadband applications show how the two are separate functions. Thus, the broadband transmission and the internet access component should not be considered a "single, integrated offering."

The MDOC believes the Commission should classify wireline broadband access as two separate services; first, the internet access portion of the service should be classified as an information service; and second, the transmission component of the broadband service should be considered a telecommunications service.

The fact that the consumer does pay a fee for the transmission component of the broadband service, clearly making it a "telecommunications service" in accordance with the 1996 Telecommunications Act. The plain text of the definition of "telecommunications service" is "…the offering of telecommunications for a fee directly to the public…" The NPRM already acknowledges that the transmission component of the broadband internet service is considered "telecommunications."[11] The consumer does not pay for the internet access alone; she pays for the broadband transmission as well. This fee is included in the total amount the consumer pays; thus, the transmission, as well as the internet service, is offered "for a fee directly to the public."[12] Thus, the transmission component of the wireline broadband internet service must be considered a telecommunications service.

The definition of "telecommunications service" is clear—if it is a transparent transmission path and it does not change the content of the information, and it is offered for a fee to the public, it must be classified as such. The plain text does not state that the service must be offered separately from another service to be considered a telecommunications service. Indeed, if bundling is deemed to be a legitimate basis to justify a change in the classification of the service, it can be anticipated that companies will engage in tactics to bypass the existing regulatory framework for all products. Wireline providers currently sell the DSL transmission component as a stand-alone service, when customers purchase internet service from an independent entity. When a customer purchases the transmission component in conjunction with the internet service, they pay a fee for the transmission as well as the internet content. If the services, when bundled, are classified as information services, incumbent carriers would have an incentive to discontinue offering DSL on a stand-alone basis. Incumbent carriers, as the primary owners of the networks, would be

[10] See http://www.qwest.com/residential/products/dsl/index.htm . Qwest's website lists prices for the DSL transmission only, and specifically notes when the internet access is not included in the quoted price.
[11] NPRM, FCC 02-42, para. 25.
[12] 47 U.S.C. 153(46).

able to stifle competition. The only ISPs that could effectively provide broadband over the telecommunications network would be the incumbent carriers themselves. Furthermore, no technical limitations preclude a provider from offering the transmission on a stand-alone basis should a customer request it. It is not only possible, but even likely that business applications or residential telecommuting applications will in the future require only the transmission component without internet access.

It is clear, then, that the telecommunications is offered for a fee, directly to the public, and in accordance with the plain language of the applicable statute[13]must be considered a "telecommunications service." The MDOC notes that the definition of "telecommunications service" not only includes the offering of the service for a fee to the public, but to "such classes of users as to be effectively available to the public…"[14] This last phrase indicates that the provision of the service does not have to be offered directly to the public to be considered a telecommunications service. By providing the broadband transmission to classes of users, such as ISP's, the service is effectively available to the public.

B. High Speed Data Service Is A Jurisdictionally Mixed Service, Providing Concurrent Jurisdiction to States and the FCC.

High speed data telecommunications services are jurisdictionally mixed in nature. In 1999 the FCC issued a declaratory ruling regarding the issue of whether local exchange carriers are entitled to receive reciprocal compensation for termination of "telecommunications traffic" delivered to an ISP.[15] The FCC's ruling attempting to to label "telecommunications" traffic as exclusively interstate services, have been inconsistent, and rejected as arbitrary on appeal.[16] In the FCC's 1999 Reciprocal Compensation Order, the FCC discussed how it had historically treated "enhanced service providers" (ESPs). ESPs are a class of service created by FCC rules that the FCC believes includes internet service providers."[17] The FCC reviewed its earlier holding that while ESPs use interstate access services, since 1983 the FCC had "exempted" ESPs from the payment of certain interstate access charges. Instead, the FCC has chose to treat ESPs as "end users for the purposes of assessing access charges, and the FCC permitted ESPs to purchase their links to the public switched telephone network (PTSN) through interstate business tariffs rather than through interstate access tariffs."[18]

The FCC then declared "the Commission has traditionally determined the jurisdictional nature of communications by the end points of the communications and has consistently rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[19] Based on this "one call" jurisdictional analysis, the FCC concluded that

> the communications at issue here do not terminate at the ISPs local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located at another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction.[20]

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[13] 47 U.S.C. 153(46).
[14] Id.
[15] In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98 (F.C.C. Feb. 26, 1999)(herein the "1999 Reciprocal Compensation Order").
[16] See Bell Atlantic Telephone Cos. V. FCC, 206 F3d 1 (D.C. Cir. 2000).
[17] Id. at ¶1, n.1. The FCC noted that it believed the term "'enhanced service' is quite similar to "'information services' . . . ." The term "information services is discussed at p. __ of this Plan.
[18] Id. ¶5.
[19] Id. ¶ 10 (citing Bell South Memory Call, 7 FCC Rcd 1619 (1992); Teleconnect Co. v. Bell Telephone of Penn., E-88-83, 10 FCC Rcd 1626 (1995); and In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, 3 F.C.C. Rcd. 2339, 2341 (1988).
[20] Id. ¶12.

The FCC then stated that the "jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet."[21] According to the FCC, the internet user typically communicates with international, interstate and intrastate servers in a single session. Based on this premise, the FCC declared, "although some Internet traffic is intrastate, a substantial portion of internet traffic involves accessing interstate or foreign web sites."[22] In the subsequent paragraph, the FCC concluded that internet traffic is "jurisdictionally mixed."[23] Recognizing that states probably relied on the FCC's exemption of ESP traffic from interstate tariff requirements, the FCC decided to continue to allow states to enforce state approved interconnection agreements requiring payment of reciprocal compensation for internet traffic.[24]

On appeal, the Court of Appeals for the District of Columbia stated that "at the heart of this case is whether a call to an ISP is local or long distance. Neither category fits clearly."[25] It also rejected as arbitrary the FCC's application of the "mixed facility" doctrine, stating that the FCC "has yet to provide an explanation why this inquiry is relevant to determining why an ISP should fit within the local call model of two collaborating LECs or the long distance model of a long distance carrier collaborating with two LECs."[26]

In its remand order, it appears the FCC missed the court's point.[27] In the introductory paragraph, the FCC reiterated the court's holding by stating that the court held the FCC "failed to adequately explain why our jurisdictional conclusion was relevant to the applicability of section 251(b)(5) . . . ."[28] To the contrary, from the MDOC's view, the court's issue was not the relevancy of the conclusion, but the lack of any rational basis for its conclusion. Instead of addressing the court's concerns, the FCC avoided them by by reclassifying these services as "information services." Moreover, the FCC reached its new conclusion, not through the application of the federal statutory scheme to a record of evidence regarding the nature of these services, but through a new interpretation of section 251(g). In developing its analysis, the FCC noted that section 251(g) "explicitly exempts certain *telecommunications services* from the reciprocal compensation obligations." (emphasis added)[29] The FCC ruled that section 251(g) explicitly carves out "information access" from reciprocal compensation obligations. This required the FCC to determine that the "traffic destined for an information service provider" is included within the scope of the term "information service." Relying on a "legacy" comprised of correspondence and dicta from the MFJ, the FCC concluded that traffic destined for information service providers is part of an information service.[30]

Commissioner Furchgott-Roth wrote in his dissent to the Commission's 2001 Reciprocal Compensation Order, that the FCC's legal analysis is "at odds with the agency's own precedent as well as the plain language of the statute."[31] Commissioner Furchgott-Roth lamented that "the result will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years."[32] In the instant proceeding, the FCC expands its "information service" analysis despite this already shaky foundation.

Information conveyed over the internet may be conveyed between an end user and a server within a state or in different states. Information may be conveyed between end users and a server in the same state, but that information may or may not cross jurisdictional boundaries. While the MDOC does not have the resources to supply the engineering analysis that would be required to more precisely develop an evidentiary record

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[21] Id. ¶ 18.
[22] Id.
[23] Id. ¶ 19.
[24] Id. ¶ 24.
[25] Bell Atlantic v. FCC, at _____.
[26] Id. at _____.
[27] Order on Remand and Report and Order, CC Dockets 96-98 and 99-68 (April 27, 2001).
[28] Id. at 1.
[29] Id. at¶32.
[30] Id. at ¶ 44.
[31] Id. Dissenting Statement of Commissioner Furchgott-Roth, at p. 66, citing 47 U.S.C. §251(b)(5) and the FCC's Order on Remand in *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 ¶¶46-49 (1999).
[32] Id.

for the application of the FCC's mixed facility doctrine, the MDOC posits that this is the required analysis. If that evidentiary record is technically impossible to develop because internet traffic cannot be accurately measured to determine whether the 10% rule applies, then the MDOC asserts that the FCC must recognize that such traffic can either be local or long distance, and that jurisdiction over such services is concurrent. For all of the reasons above, the FCC does not now have solid ground on which to conclude that broadband access is an interstate information service.[33]

B. The Policies of Encouraging Competition and Consumer Protection Require the Service to be Considered a Telecommunications Service.

A decision by the FCC to classify all "wireline broadband Internet access" as an "information service" will debilitate the pro-competitive provisions of the 1996 Act requiring interconnection, in much the same way United States of Representatives House File 1542 would have done. As telecommunications technology evolves, more and more information will be transmitted in packet-switched form, and *all* services presently classified as "telecommunications services" could arguably meet the FCC's broad concept of broadband set forth in paragraph 4 of the notice. At minimum, the FCC's reclassification of "broadband" services at this time invites a slew of new legal challenges to the market-opening provisions of the Telecommunications Act of 1996. The MDOC's experience in Minnesota is that the Regional Bell Operating Companies usually do not miss an opportunity to litigate on an issue. The FCC should be focused on leveraging the gains that have been made in achieving the vision of fully competitive markets, not making it more difficult for that vision to be attained.

While the internet access component of broadband service is not integrated with the transmission, it is dependent on the transmission, whether the internet access is provided by an independent ISP or by the wireline provider itself. The broadband transmission thus plays a central role in competition. If entities unaffiliated with the owner of the transmission bottleneck facility are not required to unbundle these facilities, making them available for use by competitors, competitors will not get access to these network. The FCC believes its tentative conclusions result in more "facilities-based" competition. This will not be the case. The provisions of the Act requiring resale and unbundling have lowered otherwise insurmountable barriers to market entry, allowing competitive exchange carriers the ability to generate revenue and earnings that can be reinvested into their own facilities. Eventually, these carriers desire to migrate more and more to their own facilities. However, there is nothing in the text of the Telecommunications Act indicating that Congress intended the Act to authorize a one-time "land rush" after the expiration of which anyone who was not able to find their homestead is out of luck. To the contrary, Congress intended to permanently reduce market entry barriers, recognizing that ease of market entry (and exit) is a key to *sustaining* the vision of the Act.

In addition to the detriment the proposed rules would have on the local competitive landscape, many consumer protections that are imposed on telecommunications services will also be jeopardized if broadband internet service is classified as an information service. For example, if a provider of local telecommunications service provides voice over DSL, is that local phone service now removed from all state consumer protection requirements? One can assume, that incumbents will raise such arguments. Can service quality be regulated simply because voice calls are packet-switched? The problem with making such categorical pronouncements is that the effects will also be categorical. The FCC should carefully consider the ramifications of its decision on state regulation of telecommunications service, taking into account that evolving technology could bring more and more services which have been traditionally intrastate telecommunications services into the parameters of its proposed "information service" definition.

Truth-in-billing requirements, too, could be affected to the detriment of consumers if the transmission component of the service is not classified as a telecommunications service. Broadband is being rapidly adopted and will quickly be considered a service essential to doing business, for businesses and consumers alike. It is in the public interest that such a necessary service be clearly billed to consumers. In the interest of protecting competition, it is important that truth-in-billing requirements be implemented so that

[33] See also Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss, California ISP Association v. Pacific Bell Telephone Co. (Case 01-07-27 March 28, 2002).

consumers clearly understand how much and what they are paying for, and can choose to switch to a competing transmission provider if they find another service that suits their interests better.

The MDOC also submits, that if the Commission were to adopt its "single, integrated" standard in deciding which components of a service are information service, the classification of existing telecommunications services could be in doubt. Because the Commission has already decided the classification of internet access service by independent ISP's as information services, the determining factor in the "single, integrated" standard appears to be the fact that both the transmission and the internet service are provided by the same entity. Do other components of services, then, provided together by the same entity become "single, integrated" offerings? For example, voice mail, an information service, is dependent on the basic phone line. A consumer would purchase her basic phone line and voice mail from the same entity, and could arguably see the two as a single, integrated offering if the fee quoted were one single fee. Is voice mail then "integrated" with the phone line, making the entire line an information service? What about customers accessing dial-up internet access services? What if the wireline provider offers billing and other customer services for another ISP, making the service appear "integrated"? For example, in Minnesota, Qwest has entered into an agreement with MSN, an ISP, to perform not only its billing and collections but marketing for broadband DSL access. Print and television ads brand the service as Qwest's, although MSN is the actual ISP involved, and the prices listed in the ads are actually MSN's. The advertisements direct consumers to Qwest phone numbers and Qwest's website, not MSN's.[34] The MDOC has significant concerns about this type of relationship, not only for its apparent discrimination against other ISP's, but in relation to the Commission's proposed "single, integrated" standard.

The "single, integrated" standard would also produce an undesirable result: broadband transmission purchased in connection with an independent ISP would be a "telecommunications service", because it is clearly provided to the public for a fee, while broadband transmission purchased with the wireline provider's own ISP would be considered an "information service." Thus, the total package purchased by the consumer would be classified and regulated differently depending on the level of vertical integration by the service providers.

The FCC's stated goal in the NPRM is to accelerate the deployment of broadband. There is no empirical data cited in the NPRM indicating that its reclassification determination will have the intended effect. To the contrary, it has only been through regulation that many telephone exchanges in Minnesota have received any access to high-speed data services.[35] Options other than attempting to remove a broad swath of services from state jurisdiction should at least be explored before such a drastic step is taken. Perhaps the FCC should explore partnerships with states to achieve broadband deployment goals rather than attempting to preempt their power to assist in achieving of those goals at all.

III. Regulatory Framework

No changes to the existing regulatory framework are necessary at this time. Broadband access is not an interstate information service, and the FCC has no rational basis for such a determination. Such services should be subject to the same general interconnection obligations as any other telecommunications service under Title II, subject to the FCC's local competition rules.

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[34] For example, a newspaper advertisement that ran in the Minneapolis Star Tribune states: "Now You Can Get High Speed Internet from Qwest For Less than the Costs of Your 56K Internet Service." Only in the lower left corner of the ad is MSN mentioned as the actual ISP. The ad goes on to list promotions, such as the free use of a modem, free activation, and a free month of internet service when the consumer purchases a residential phone package from Qwest. Qwest has represented to the Minnesota Public Utilities Commission that these are MSN, not Qwest, promotions. See MPUC Docket No. P421/C-02-94. The consumer is directed to a toll-free number which is Qwest's, and to Qwest's website.

[35] See In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc., and U S WEST Communications, Inc., Stipulation and Agreement, MPUC Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192; In the Matter of a Petition by Frontier Communications of Minnesota, Inc. for Renewal and Revision of Its Alternative Regulation Plan.